IN THE

Supreme Court of the United States

October Term, 1963

No. 81

NATIONAL EQUIPMENT RENTAL, LTD.,
Petitioner,

—against—

STEVE SZUKHENT AND ROBERT SZUKHENT,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF THE BANKS NAMED BELOW FOR LEAVE TO FILE THE ACCOMPANYING BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

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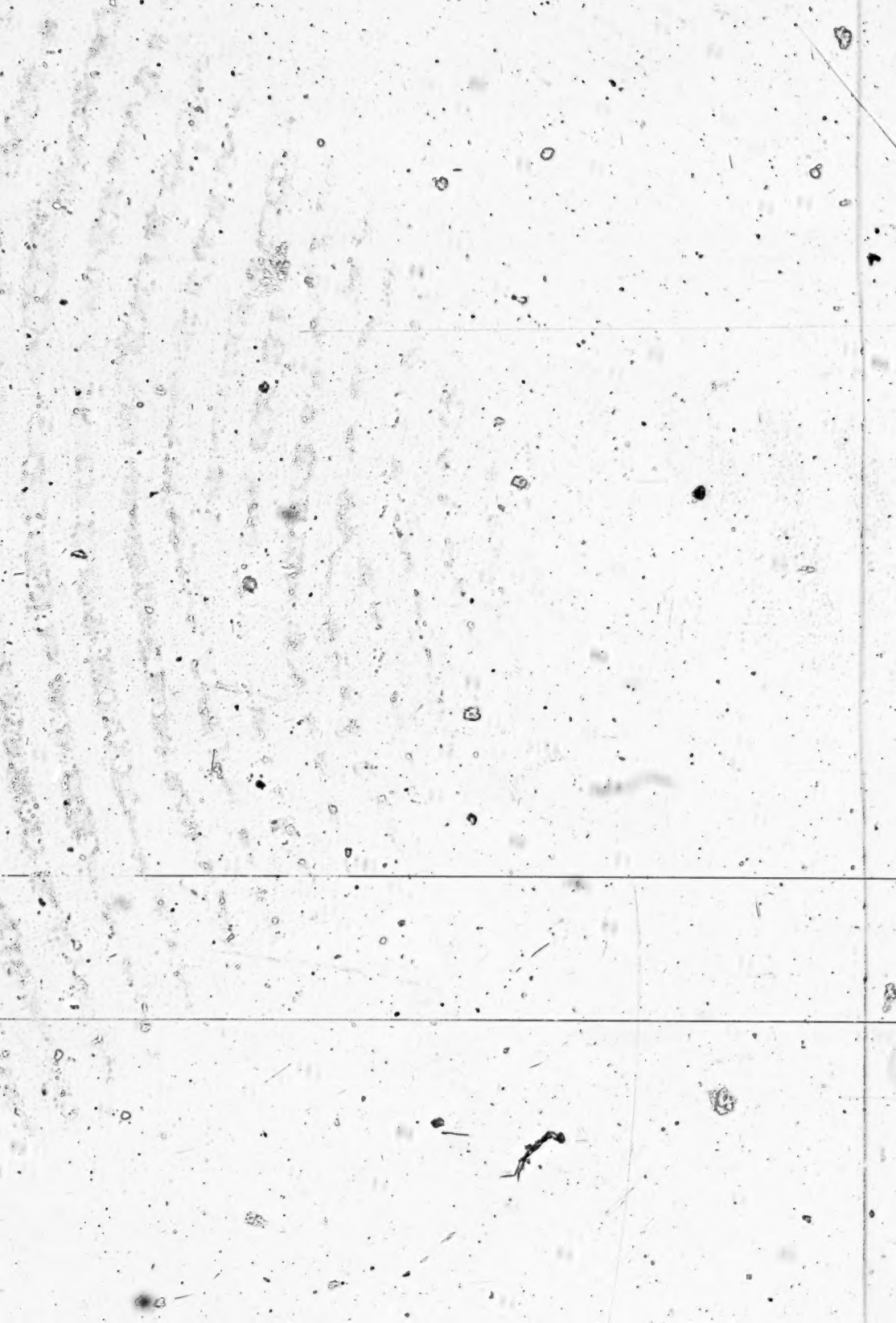

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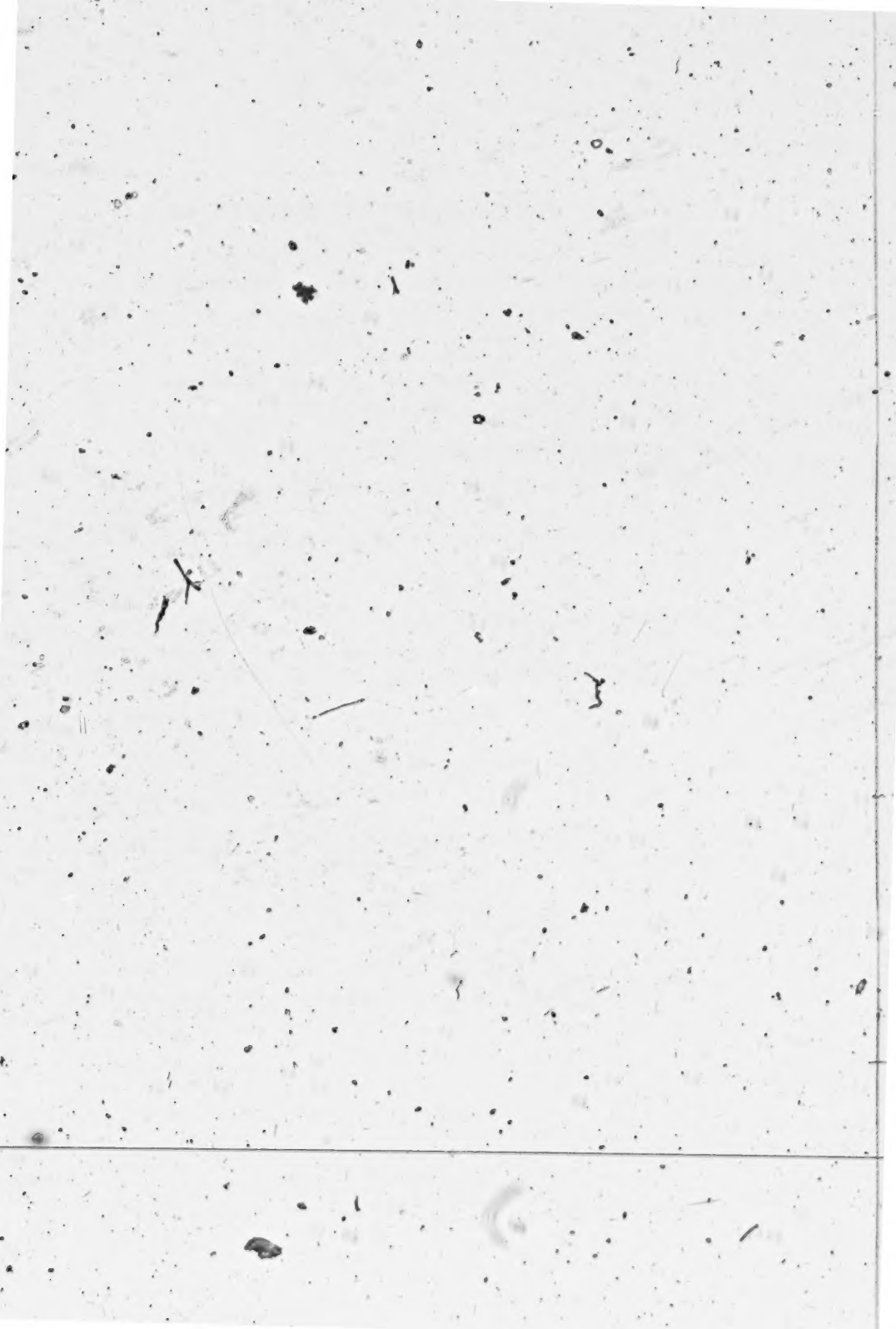

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MOTION

The undersigned banks in the City of New York hereby respectfully move for leave to file the accompanying brief *amici curiae* in support of petitioner. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the defendant-respondent was requested but refused.

The case comes to this Court by writ of certiorari granted April 22, 1963. On the petition for such writ, the undersigned banks moved for leave to file a brief *amici curiae* in support of the petition. That motion was granted by this Court on April 22, 1963.

The instant motion is for leave to file a brief *amici curiae* on the merits of the case.

The Decision Below

In the instant case, the Court of Appeals for the Second Circuit, in a two-to-one decision, held that a designation by a non-resident of a local agent to receive service of process in New York was invalid for lack of an express agreement by the agent to act as such and to notify the principal of the receipt of any process.

Interest of the Undersigned Banks

The interest of the undersigned banks in this case arises from the fact that they are engaging and have engaged in numerous financing, banking and fiduciary transactions, national and international. These transactions take a great variety of forms, of which a few examples are promissory notes, revolving credit agreements, loan agreements, guarantees, debenture indentures, escrow agreements, fiscal agency appointments and the like. Also, the banks make loans on the security of the assignment of rentals payable under chattel leases of the kind here involved.

In a considerable number of these instruments, particularly those involving borrowers and other customers in foreign countries, there is a clause, similar to the clause under consideration in this case, whereby the customer designates an agent for the service of process in New York. Without a provision for the appointment of a local agent for the service of process, interstate and international financial transactions would be severely hampered. A local lender must have some assurance that he can enforce

the terms of his agreement without having to resort to the courts of a foreign state or country in a suit on the merits.[1]

The bulk of the transactions referred to above are long-term. Because of this it is necessary to make the appointment of a local agent a permanent appointment, not subject to lapsing by virtue of the death of any one individual. For this reason these agents are usually designated in terms of an official capacity, rather than by name. Thus there are designations in terms of "the Consul General of Canada in New York", "the Secretary of X Bank", and "any partner in the law firm of X Y and Z". If the opinion of the Court of Appeals requires, as it appears to, that the agent indicate his consent at the time of the appointment, that requirement is impossible to satisfy when the agent is designated by office rather than by name, since the consent would be valid only so long as the occupant of the office remained the same. If the opinion means that the consent may be given subsequently by each successive incumbent of the office, the requirement is not only unduly burdensome but presents the very real danger that the incumbent will be unaware of or will overlook the need to express his consent to the principal. Even in those cases where the agent is designated by name, express consent by the agent to act as such is probably the exception rather than the rule.

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[1] As Judge Moore pointed out in his dissent below "To carry a New York obtained judgment to the other forty-nine states for enforcement is quite a different matter than trying lawsuits and engaging counsel for this purpose in these other States." R. 27,

Questions of Law and Fact that May Not Adequately Be Presented by the Parties

The undersigned believe that there are at least three relevant issues of fact and law which they can submit to this Court over and above the material that has been, and apparently will be, submitted by the Petitioner.

First, as indicated above, the undersigned have daily and firsthand knowledge of the great practical utility in commercial and financial transactions of the designation of a local agent to receive service of process, the wide variety of the situations in which this practice is used and the unwarranted damage that the instant decision would do to this practice.

Second, the undersigned have noted that the rules of the law of agency, particularly the *Restatement 2d*, as applied to the designation of an agent to receive service of process, were not discussed in the briefs of the parties in the Court of Appeals or in the Petition for Certiorari, although the *Restatement* was the principal authority relied on by the majority in the decision below. Since we believe that the court below applied incorrect agency principles, we request the opportunity to brief this Court on the subject.

Third, there are numerous instances in which nonresident persons are required, by statute and by administrative rule, to designate a local agent to receive service of process or to receive service of formal papers akin to process. Thus the Interstate Commerce Act requires common carriers to designate an agent in Washington, D.C. for service of process and other papers. 49 U.S.C. § 50. There is no requirement in the statute that the designated agent expressly consent to act as agent. Similarly the

Securities and Exchange Commission requires the inclusion in each Registration Statement of the name and address of an agent for service (Form S-1); it requires in each application for registration as a broker or dealer, and in each application for registration as an investment adviser, a consent by the applicant that notice of any proceeding before the Commission may be served on a person designated by the applicant (Forms BD and ADV). None of these forms provides for any expression of consent by the person so designated.

Dated: New York, New York
August 23, 1963

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITIONER

Summary of Argument

The court below erred in holding invalid a provision in a lease appointing a third person, not a party to the lease, agent of the lessee to receive process in any action arising out of the lease. In so holding the court placed an unwarranted interpretation on Rule 4(d) of the Federal Rules of Civil Procedure, and decided a question of law which is of major importance to the financial and business communities in a manner inconsistent with well-established patterns of business and in conflict with principles of law established by other courts. The court reached this erroneous conclusion because it misinterpreted basic principles of the law of agency and completely ignored the principle that an agency is created when the agent acts on the principal's behalf, as well as when the agent agrees to act on the principal's behalf.

In the course of its opinion below, the court announced a rule requiring that a contract appointing an agent for process make intrinsic provision insuring that the principal will receive notice of any service of process upon the agent. This is error because there is no such requirement when individuals freely contract for a method of substituted service. It is well settled that private parties can agree that service or notice be waived in any action arising out of the contract. There is no question of due process in the case under consideration since notice was in fact given to respondent.

The concern of the court below with contracts of adhesion was completely unwarranted. Modern commerce could not be carried on without a great variety of forms and the presence of a form does not necessarily imply the presence of a contract of adhesion. There is no indication from the Record that the parties were of unequal bargaining power. Furthermore, the court should not be required to look behind every contract in order to determine whether it was freely entered into or whether it was a contract of adhesion.

ARGUMENT

POINT I

In order for there to be an effective agency a person appointed an agent need not, at the time of his appointment, expressly undertake to act for his principal.

Paragraphs (1) and (3) of Federal Rule of Civil Procedure 4(d) provide that service of process upon an individual, corporation, partnership or unincorporated association may be made on "an agent authorized by appointment or by law to receive service of process". There is no indication that any principles other than generally accepted agency principles are to govern the determination of who is "an agent authorized by appointment." In the case at bar, by the terms of the lease, Weinberg was appointed agent of the lessees. She acted as such by receiving process and promptly forwarding a copy to her nonresident principals. Nevertheless, the court below held the appointment ineffective because "defendants never dealt with her and had no indication of any undertaking

on her part to act as their agent until receipt of process many months later." R. 25.

As authority for the novel position that an agent must, at the time of his appointment, expressly undertake to act as agent, the court relied upon Sections 1 and 15 of the *Restatement of Agency*[2]. R. 25. These Sections stand for the proposition that an agency exists only if there has been a manifestation by the principal that the agent may act on his account and subject to his control, and consent by the agent so to act. However, this does not support the proposition, implicit in the holding below, that express consent of the agent must be given at the time of his appointment.

On the contrary, the *Restatement* specifically negatives any such conclusion by recognizing that the required consent may be given either by an agreement to act or by performing the required act.

> "* * * The principal must in some manner indicate that the agent is to act for him, and the agent *must act or agree to act* on the principal's behalf and subject to his control. * * *" (*emphasis added*) *Restatement Agency* 2d § 1 Comment a (1958).

Comment (b) to Section 15 is even more closely in point. After stating the principle that the agency relation exists only if the agent consents to it, the comment continues:

> "* * * As in the case of contractual relations, the manifestation of the principal may be such that it is not necessary for the acceptance to be communicated to him. Thus, if the principal requests another to act for him with respect to a matter,

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[2] In this Brief, all citations to the *Restatement* are to the Second edition (1958).

> and indicates that the other is to act without further communication and the other consents so to act, the relation of principal and agent exists. If, under such circumstances, the other does the requested act, it is inferred that he acts as agent unless he manifests that he does not so intend or unless the circumstances so indicate. This inference is strengthened if, being requested to act in the matter, the other does something which he could properly do only as an authorized agent." *Restatement Agency* 2d § 15 Comment b (1958).

The three illustrations given for this last comment are all cases where the agent acts without otherwise communicating his consent to the principal. For example, Illustration 1 states: "P writes to A, whose business is purchasing for others, telling him to select described goods and ship them at once to P. Before answering P's letter, A does as directed, charging the goods to P. A is authorized to do this." *Restatement Agency* 2d § 15 Comment b Illustration 1 (1958).

The case at bar falls precisely within this principle. The appointment of Weinberg by respondents was in such terms as to indicate that she was to act without future communications from respondents. She was to accept service of process on their behalf. This she did, and when she did so, she acted as agent.

> "The principal's authorization may neither expressly nor impliedly request any expression of assent by the agent as a condition of the authority, and in such case any exercise of power by the agent within the scope of the authorization, during the term for which it was given, or within a reasonable time if no fixed term was mentioned, will bind the

principal." 2 *Williston on Contracts* § 186 (3rd ed. 1959).

The insistence by the court below upon consent by the agent to act, and its refusal to recognize the doing of the requested act as effective, is thus seen to be completely contrary to long established legal principles. The court's preoccupation with express consent and with the fact that lessees and Weinberg did not deal with one another would seem to indicate that the court requires a contract between the parties before there can be a genuine agency. It is manifest that insistence upon a contract is error:

> "It is not essential to the existence of authority that there be a contract between the principal or agent or that the agent promise or otherwise undertake to act as agent." *Restatement Agency* 2d § 26 Comment a (1958).

As indicated above, to require an agent to give a specific undertaking to act would upset well-settled procedures in important transactions in the business and financial communities. We of course believe the decision below to be error as a matter of law. Even if the majority below intended the principles enunciated to be confined to the facts of this case, it is possible that some persons will read the decision below as casting doubt upon the validity of many executed transactions wherein the procedure under discussion was used. Furthermore, the decision below might be read to apply to all agency arrangements and not only to appointments of agents for service of process. This would cause complete confusion and chaos because as we have indicated, the result has no basis in law. There was never any requirement that an agent, at the time of his appoint-

ment, must expressly consent to act as agent. This is evident, for example, by reference to the New York statutory short form of general power of attorney, General Business Law Art 13 §§ 220-235.[3] A power of attorney is one type of agency and yet the statutory form of power provides no place in the instrument for the agent to indicate his consent to act as agent. Similarly, the forms of power of attorney contained in leading form books, *e.g.* 7A Nichols, *Cyclopedia of Legal Forms Annotated* §§ 7.1565-7.1572 (1959), have no provision for the agent to expressly undertake to act as agent. Indeed, the New York statutory short form of general power of attorney includes, as one area of authority granted to the agent, "claims and litigation". Section 229(6) of the General Business Law expressly provides that, if this authority is granted, the principal authorizes the agent "to accept service of process, to appear for the principal, to designate persons upon whom process directed to the principal may be served, * * * " And yet the prescribed text of the power of attorney (General Business Law § 220) is entirely silent as to any requirement that the agent express his agreement to serve.

In addition, the decision below casts doubt upon the validity of procedures required by federal statutes and federal regulatory agencies. Thus the Interstate Commerce Act requires common carriers to designate an agent in Washington, D. C. for service of process and other papers. 49 U.S.C. §50. The designation must be in writing and is to be filed with the Secretary of the Commission. There is

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[3] Article 13 of the General Business Law will be replaced by Title 15, Article 5, of the General Obligations Law, effective September 27, 1964. The General Obligations Law makes no change of substance in present Article 13 of the General Business Law.

no requirement in the statute that the designated agent expressly consent to act as agent. Similarly, in numerous instances the Securities and Exchange Commission requires that non-resident persons designate a local agent to receive service of process or to receive service of formal papers akin to process. Thus § 8(f) of the Securities Act of 1933, 15 U.S.C. § 77h(f), provides that any notice of hearing on a stop order under § 8 of the Act can be served on a foreign person by serving "its duly authorized representative in the United States named in the registration statement." And Form S-1, the ordinary form of registration statement for issues or distributions required to be registered under that Act, contains on the facing sheet a requirement for the "(Name and address of agent for service)"; see also Forms S-2, S-5, S-8, S-9 and S-14. In none of these Forms is there any provision for the person so designated to undertake expressly to act as agent, nor is this in fact done.

In addition to requiring an express undertaking by the agent to act as agent, the court below was apparently concerned by the fact that defendants never met Weinberg (the agent). This is evident from the court's statement that, "Defendants never dealt with her * * * ". R. 25. Insistence upon direct dealing between principal and agent is clearly error. As the *Restatement of Agency* states:

> "The manifestations to the agent can be made by the principal directly, or by any means intended to cause the agent to believe that he is authorized or which the principal should realize will cause such belief." *Restatement Agency* 2d § 26 Comment b.

There are numerous agency relationships created without principal and agent ever meeting, or even dealing di-

rectly with one another. One such example is an ordinary stock power for the transfer of shares of stock. 3 Nichols, *Cyclopedia of Legal Forms* § 3.974 (1958). A stock power in addition to transferring the stock to another, also contains a power of attorney to transfer the stock on the books of the corporation. The transferor of the stock invariably leaves the attorney's name blank, since he does not know who will make the transfer on the books. The attorney is a clerk of the transfer agent and fills in his own name when he makes the transfer on the books. I Christy, *The Transfer of Stock* § 63 (3d ed. 1962). The transferor (the principal) and the attorney (the agent) never meet or deal directly with one another and yet there is a valid agency relationship between them. Thus it is clear that there is no requirement that the principal and agent ever deal directly with one another.

POINT II

The court below erred in requiring a provision in the lease whereby the agent undertook to give notice to the principal.

The court below, in addition to requiring that the agent, at the time of his appointment, consent to act as agent, interpreted Rule 4(d) as requiring that the agent also undertake to give notice to his principal of any future service of process. The absence of such an undertaking in the case at bar contributed to invalidating the lease provision for the appointment of the agent. The court reached this result although in fact the agent gave written notice.

In reaching this result the court relied upon *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928), which decided that a state

non-resident motorist statute was unconstitutional because it did not require the statutory agent to give notice to the defendant. In the case at bar the court below recognized that "There is no such requirement when individuals freely contract for a method of substituted service." R. 25. However, in the guise of "determining the meaning and effect of the provisions of the contract", R. 25, the same court read the constitutional requirements of *Wuchter* into private contracts providing for a method of substituted service. This holding is manifest error. In the first place there is no such requirement in private contracts entered into by individuals. Secondly, this issue was not properly before the court.

It is settled that private parties to a contract can agree that service or notice be waived in any action arising out out of the contract. *Bowles* v. *J. J. Schmitt & Co.*, 170 F. 2d 617, 622 (2d Cir. 1948), *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931). Since notice can be waived by the parties, it is clear that there is no rule that a provision for notice must be inserted in a contract. This is the result that has been reached by other courts faced with this issue. Thus, in *Kenny Construction Company* v. *Allen*, 248 F. 2d 656 (D.C. Cir. 1957), a construction contract entered into between engineering consultants and the District of Columbia stated that the engineering firm appointed the clerk of the court its agent to receive service of process in any action arising out of the contract or the work required to be performed under it. There was no provision for notice to be given to the engineering consultants in the event service was so made. The court held, in an action between a contractor and the engineering consultants, that service could be had on the latter by

serving the clerk of the court. Thus, a contract provision similar to the one under discussion, with no requirement for the giving of notice to the principal, was held to be valid—even in favor of a person who was not a party to the contract.

In *Green Mountain College* v. *Levine*, 120 Vt. 332, 139 A. 2d 22 (1958), a promissory note between private individuals appointed the Secretary of State agent of the debtor to accept service of process. The debtor defaulted and suit was brought by serving the Secretary of State. There was no provision in the contract whereby the agent undertook to give notice to the principal. The court held that service was proper, quoting with approval from *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931):

> " 'Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought. Few arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. Courts should endeavor to keep the law at a grade at least as high as the standards of ordinary ethics. Unless individuals run foul of constitutions, statutes, decisions or the rules of public morality, why should they not be allowed to contract as they please? Our government is not so paternalistic as to prevent them. Unless their stipulations have a tendency to entangle national or a state affair, their contracts in advance to submit to the process of foreign tribunals partake of their strictly private business. Our courts are not interested except to the extent of preserving the right to prevent repudiation. In many instances

problems not dissimilar from the one presented by this case have been solved. Vigor has been infused into process otherwise impotent. Consent is the factor which imparts power. Textwriters have discussed the subject and have concluded from the authorities that nonresident parties may in advance agree to submit to foreign jurisdiction. Beale, the Jurisdiction of Courts over Foreigners, 26 Harvard Law Review, 193; Freeman on Judgments (5th Ed.) p. 3053; Goodrich, Conflict of Law, p. 141; Scott, Fundamentals of Procedure, pp. 39-41.'" 139 A. 2d at pp. 824-25.

From the above it is clear that Rules 4 (d) (1) and (3) do not require the designated agent to undertake to give notice to his principal of any future service of process and that any holding to that effect by the court below should be reversed.

While holding that there must be an undertaking by the agent to give notice of service of process to the principal and that the lack of such provision invalidated the service in this case, the court below, relying upon *Wuchter* v. *Pizzutti*, 276 U. S. 13 (1928), held irrelevant the fact that in this case notice was actually given. It is submitted that once it was determined that notice was in fact given this should have ended the court's inquiry into the matter.

In *Wuchter, supra,* notice was in fact given, but this did not halt this Court from making further inquiry. The reason actual notice was considered irrelevant in *Wuchter* was because of the demands of the Fourteenth Amendment. As this Court stated (276 U. S. at 24): "Not

having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or to service under it, * * *." But in the case at bar, there is no issue of state power under the Fourteenth Amendment. There is no agency forced upon the principal by virtue of a state statute and thus giving rise to a question of due process. Rather, there is merely the issue of the effectiveness of service pursuant to a private contract. In fact, notice was given. Hence, *in this case*, there was no denial of due process. As Professor Moore states:

> "The phrase 'agent authorized by appointment to receive service of process' is intended to cover the situation where an individual actually appoints an agent for that purpose. No question of due process arises with respect to service upon an agent in such a situation." 2 *Moore's Federal Practice* ¶4.12, p. 931 (2d ed. 1962).

Consequently, no issue of due process was before the court, and the court exceeded its authority when it decided that the lease itself must provide for notice. As Judge Moore, in his dissent in the court below, stated (R. 30):

> "To allow a defendant to insist upon what the majority here holds to be a defect in this privately drafted and voluntarily agreed to agency appointment, even though he has in no way been prejudiced thereby, is the essence of formalism. The purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend. International Shoe Co. v. Washington, 326 U. S. 310 (1945); Wuchter v. Pizzutti, supra, Grooms v. Greyhound Corp., 287 F. 2d 95 (6th Cir. 1961); Tarbox v. Walters,

192 F. Supp. 816 (ED Pa. 1961); American Football League v. National Football League, 27 F.R.D. 264 (D Md. 1961). Once it is found that that purpose has been served, the inquiry should come to an end."

POINT III

The emphasis by the court below upon contracts of adhesion is unwarranted by the record and is improper as a practical matter.

The court below was obviously concerned that the provision in question could be used as a vehicle of oppression to permit the entry of a default judgment without notice to the defendant. This is the thrust of the court's remark that the contract in question is "a contract of adhesion", R. 25.

The phrase, "contract of adhesion", seems to have first been used in Patterson, *The Delivery of a Life Insurance Policy*, 33 Harv. L. Rev. 198, 222 (1919). A leading article by Professor Kessler discusses these contracts in great detail. Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629 (1943). Professor Kessler uses the phrase to describe form contracts which are thrust by one party on the other, with no choice in the latter but to adhere. Professor Kessler recognized that "In so far as the reduction of loss of production and distribution thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts." *Id.* at 632. However, he argued that standardized contracts are in *some cases* contracts of adhesion due to the fact that they are used by enterprises with strong bargaining power, where the

weaker party is in no position to shop around for better terms because the user of the standard contract is a monopoly or because all competitors use the same clauses.

It may well be that in some cases standardized contracts are "contracts of adhesion", in the invidious sense of that phrase. But it is fantasy to assume, as the court below did, that every contract on a printed form is a "contract of adhesion". It is obvious that modern society cannot function without a wide use of forms. The mere use of a form does not necessarily suggest superior bargaining power and consequently a "contract of adhesion". Thus, the contracts in which we, the *amici curiae,* use the appointment of agent clause would not be considered adhesion contracts. The transactions involve banks on one side, and many of the largest United States and foreign corporations on the other side, a situation in which there is certainly no unequal bargaining power and consequently no element of adhesion. Yet the decision of the court below seems to assume that every contract, on a standard form, in which there is an appointment of a local agent for the service of process, is an adhesion contract.

Looking to the facts of this case, there is no evidence in the Record that National Equipment Rental, Ltd. had bargaining power superior to that of the defendants. For all we know National is a small company and the Szukhents have a large farm upon which are used many machines similar to the ones leased in the instant case. It is also perfectly obvious that National is not the only equipment leasing company in the United States. The Szukhents were certainly able to shop around for terms which they believed to be favorable. Thus, there is no evidence in the Record that this is a "contract of adhesion".

Even if this is considered to be a "contract of adhesion", there is still no warrant for completely disregarding a clear and unambiguous contractual provision. Provisions which are contained in contracts of adhesion are merely interpreted least favorably to the person who supplies the words. This salutary rule is one of interpretation only, and is not to be applied unless after the application of all other rules of interpretation, there remain two possible and reasonable interpretations:

> "After applying all of the ordinary processes of interpretation, including all existing usages, general, local, technical, trade, and the custom and agreement of the two parties with each other, having admitted in evidence and duly weighed all the relevant circumstances and communications between the parties, there may still be doubt as to the meaning that should be given and made effective by the court. This doubt may be so great that the court should hold that no contract exists. If, however, it is clear that the parties tried to make a valid contract, and the remaining doubt as to the proper interpretation is merely as to which of two possible and reasonable meanings should be adopted, the court will adopt that one which is the less favorable in its legal effect to the party who chose the words." 3 *Corbin on Contracts* § 559 (1960).

The rule has no application if the contract term has only one reasonable interpretation.

In the case at bar, the provision for the appointment of the agent was clear and unambiguous. It is not subject to two or more reasonable interpretations and there is consequently no reason to apply rules of interpretation. Therefore, the contract should be enforced as written even if it were to be considered to be a "contract of adhesion".

The court below however went far beyond the application of this rule of interpretation. The court did not interpret the provision in a manner less favorable to the party who chose the words. Rather it disregarded the provision entirely. There is no authority for doing this merely because a contract of adhesion is involved.

What the court in fact did was to refuse to give effect to a provision because the court apparently believed it to be unconscionable. While such action has authoritative precedent in some cases, e.g. *Hume* v. *U. S.*, 132 U. S. 406 (1889), the provision which is sought to be avoided must be truly unconscionable so that to enforce it would be "inconsistent with sound policy and good morals." *Trist* v. *Child*, 21 Wall (U. S.) 441 (1874). Examples of such provisions are agreements for the control of public officials, *Linn* v. *Ula Uranium Company*, 163 F. Supp. 245 (D. Utah), *aff'd*, 265 F. 2d 916 (10th Cir. 1959); an agreement between a lawyer about to be elected to a judgeship and another lawyer to divide a fee to be received in connection with handling a case by the latter in the court in which the first mentioned lawyer was to sit as judge, *Schnackenberg* v. *Towle*, 4 Ill. 2d 561, 123 N. E. 2d 817, *cert. denied*, 349 U. S. 939 (1955). The cases are collected in 4 *Williston on Contracts* § 615 A (3d ed. 1961).

The appointment of an agent for service is manifestly not in the class of provisions which are considered to be oppressive or unconscionable. This is a procedure, sanctioned by the Federal Rules of Civil Procedure, which is found in innumerable contracts. The fact that this provision is agreed to every day by hundreds of contracting parties—large and small—is evidence of its wide acceptability

and unoppressive nature. Consequently there was no valid basis on which the court could disregard this provision.

In addition, we question whether this is the type of inquiry the courts can and should undertake in every case. The factors suggested above would have to be examined in each case in order to determine whether there was actual consent or whether a contract of adhesion was involved. As the Virginia Law Review states in discussing this case:

> "However, the application of this result is not without pitfalls. The issue of actual consent is injected into every suit on such a note or form contract. Hence, though the court reached a desirable result, the application of the principle evolved in the case may prove somewhat difficult." 49 Va. L. Rev. 1030, 1035 (1963).

Judge Moore, dissenting below, perhaps best sums things up when he states:

> "Hard cases may make bad law but easy cases, misconceived to be hard ones, make even worse law because in the latter there is not even the seeming justification attendant the former.
>
> Defendants here received all they were entitled to. They agreed to submit to the jurisdiction of the courts in New York and that is all plaintiff required them to do. No default judgment is contemplated; they received adequate notice of the suit pending against them and were afforded ample opportunity to defend. In order to relieve them of this obligation which they voluntarily incurred, the majority throws in doubt the validity of countless provisions of a similar nature and throws the law into a state of confusion and uncertainty. If, as the majority seem to fear, this agency provision can be used as

a vehicle of oppression and overreaching, I suggest that we wait until such a case is presented to us. The same Federal Rules that provide for service of process upon an agent authorized to receive such service also contain provision for the setting aside of default judgments, Rule 55(c), and for relieving a party from a final judgment, Rule 60(b). I cannot bring myself to believe that the federal courts would not, in such a case, use the above rules to good advantage.

I would require the parties to abide by their contract and would reverse the district court." R. 31-32.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Dated: New York, New York
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Respectfully submitted,

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